Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIE JOE FLOWERS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondents.

Petition for Writ of Certorari to the Mississippi Intermediate Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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October 8, 1997

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4988

QUESTIONS PRESENTED FOR REVIEW

1. The trial courts error in improperly instructing the trial jury violates defendants Sixth Amendment right to a trial by a fair and impartial jury.

2. Cumulative errors beginning at the trial court level and the failure to grant appellate relief is a violation of due process and equal protection set out in the Fifth Amendment made applicable to the States by and through the Fourteenth Amendment.

   a. The trial court erred in failing to grant Pre-Trial Motion For Production of Exculpatory Materials;

   b. The trial court erred in failing to grant Motion For New Trial;

   c. The trial court erred in failing to grant directed verdict;

   d. The trial court erred in failing to grant JNOV;

   e. Error was committed by failing to have a mental examination to determine competency to stand trial or in the alternative to mitigate sentence.

   f. The Mississippi Supreme Court erred in failing to grant Petition For Certiorari.

LIST OF PARTIES TO THE PROCEEDING

The petitioner, Willie Joe Flowers, was the defendant below and appellant in the Mississippi Supreme Court.

Respondent, State of Mississippi, was the plaintiff below and appellee in the Mississippi Supreme Court.

Cecil Leo Young and Larry Gene Young were defendants in the indictment, but were not parties to the trial court or appeal and are not respondents in this Court.

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1. THE TRIAL COURTS ERROR IN IMPROPERLY INSTRUCTING THE TRIAL JURY VIOLATES DEFENDANTS SIXTH AMENDMENT RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. 15

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IN THE
Supreme Court of the United States
October Term, 1997

No. _____

WILLIE JOE FLOWERS,
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STATE OF MISSISSIPPI,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth District

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PETITION FOR A WRIT OF CERTIORARI

CITATION OF THE REPORTS OF OPINIONS IN THE CASE

The decision, from the appeal to the Mississippi Supreme Court is a non-published opinion as *Willie Joe Flowers v. State of Mississippi*, No. 94-KA-00927 COA issued February 25, 1997. [APPENDIX B] The decision on the Petition for Rehearing to the Mississippi Intermediate Court of Appeals is a non-published opinion as *Willie Joe Flowers v. State of Mississippi*, No. 94-KA-00927-COA issued April 17, 1997. [APPENDIX C]

The opinion of the Intermediate Court of Appeals in the *Willie Joe Flowers v. State of Mississippi*, review of which is sought herein, was issued July 16, 1997, and said court denied Petitioner's Petition for Writ of Certiorari being number 94-CT-00927-SCT. [APPENDIX D]

STATEMENT OF THE BASIS FOR JURISDICTION

Willie Joe Flowers was indicted by a Grand Jury for the State of Mississippi, Seventeenth Circuit Court District, Second Judicial District of Panola County during the April 1994 Grand Jury Session for direct violation of Sections 97-3-19(2)(e) (capital murder) and Section 97-3-53 (kidnapping), Mississippi Code 1972 Annotated. Willie Joe Flowers was found guilty of manslaughter and sentenced to serve a term of twenty (20) years in the Mississippi Department of Corrections. The judgment of guilt and sentence of the court of the State of Mississippi was entered on September 7, 1994. [APPENDIX A]

Willie Joe Flowers sought rehearing pursuant to Rule 17 M.R.A.P. in the Intermediate Court of Appeals for a review and final decision of the trial court in the State of Mississippi, Seventeenth Circuit Court District, Second Judicial District of Panola County as to his conviction and sentence. The Intermediate Court of Appeals denied appeal on February 25, 1997. [APPENDIX B]

The jurisdiction of the Mississippi Supreme Court is pursuant to Rule 17 M.R.A.P., authorizing discretionary review by this Court by *Writ of Certiorari* when the Intermediate Court of Appeals denies a Petition For Rehearing. [APPENDIX C]

The opinion of the Mississippi Supreme Court was issued on July 16, 1997. [APPENDIX D] No Petition For Rehearing or Motion For Extension of Time in which to file this petition has been filed.

The Order of the Mississippi Supreme Court is a final order and jurisdiction in the Mississippi Supreme Court was proper under Rule 17 of the Mississippi Rules of Appellate Procedure.

This Court has jurisdiction pursuant to Rule 13 of the United States Supreme Court Rules and the review of the judgment and sentence in question by writ of certiorari under the following statutes: a) 28 USC 2102. Priority of criminal case on appeal from State court; b) 28 USC 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari; c) 28 USC 2104. Appeals from State courts; d) 28 USC 2105. Scope of review; abatement; e) 28 USC 2106. Determination.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are set forth verbatim in the Appendix.

The statutes and provisions involved are the Sixth Amendment to the Constitution of the United States, U.S. Const., Amdt. 6; the Fourteenth Amendment to the Constitution of the United States, U.S. Const., Amdt. 14,

STATEMENT OF THE CASE

On April 7, 1994, Willie Joe Flowers, a twenty-two (22) year old black male, together with Cecil Leo Young and Larry Gene Young, two (2) of his maternal uncles, was indicted on the first count of a two count indictment charging Willie Joe Flowers with capital murder of Danny Hughes and in count two (2) kidnapping. The jury trial was held August 1 through August 5, 1994 and the jury returned a verdict of manslaughter. Willie Joe Flowers was sentenced to serve a term of twenty (20) years in the Mississippi Department of Corrections.

A. Factual Predicates for Petitioner's Claims

The facts of this case are simple. Willie Joe Flowers was a "mark". A trial witness, Charlie Thornton, testified he called Danny Hughes for marks. [TR 232] Charlie Thornton also testified that Danny Hughes carried a gun when gambling. [TR 233-234] Willie Joe Flowers is mentally challenged. [See School Records of South Panola High School Special Education, Communicare, and Mental Health Records] Charlie Thornton, an admitted gambler and a possible member of the Vice Lords [See Statement of Panola County Sheriff David Bryan regarding the colors and lettering of jacket, i.e. purple/black with gold letters "Lower LA") and Wrennie Flowers, Thornton's co-hort, believed that Willie Joe Flowers had money or access to money from a civil lawsuit, which allegedly resulted in money damages. [See Statement of Sheriff David Bryan and State's Witness Subpoena List including the name of David Walker, an Attorney in Batesville]

According to the testimony, the rest is abundantly clear. Charlie Thornton and Danny Hughes ran an illegal professional gambling operation in Panola County, Mississippi, for approximately two and one-half (2 1/2)

years. [TR 230-232, 236] Thornton and Willie Joe Flowers' uncle, aka "Wrennie", on Sunday, set Willie Joe Flowers up for a game. Thornton lost approximately $1,400.00 to Flowers. Thornton and Flowers continued to play on Monday, March 7. Thornton lost $80.00, then $500.00 more, then another $500.00, then $300.00, which Thornton borrowed from Flowers, and then an additional $1,600.00. Thornton was into his "mark" Flowers for approximately $3,000.00 after Monday. Thornton testified that he and Hughes gambled together and when he [Thornton] lost, he would call Hughes to "beat them." [TR 203]

After losing the $3,000.00, Thornton set up a "game" on a cellular phone between Willie Joe Flowers and someone identified only as "Black Joe". The person who showed up with Thornton was Danny Hughes. Danny Hughes is a collector/enforcer from Memphis, Tennessee for various gamblers and people engaged in other elicit activities. [TR 203]

Charlie Thornton, Danny Hughes, and "Wrennie" took Willie Joe Flowers to Thornton's residence in Sardis, Mississippi. Danny Hughes lost approximately $1,000.00 to Willie Joe Flowers. [TR 450] Allegedly, Danny Hughes had no more money. Hughes had a Rolex watch on, estimated to be worth $10,000.00. Hughes and Thornton went to Batesville Pawn Shop, Batesville, Mississippi, to pawn the watch. Hughes asked for $3,000.00, but Doyle Pearson, the owner of Batesville Pawn Shop, would not loan it to him. Hughes then went back to Memphis. Thornton followed and "Wrennie" took Willie Joe Flowers to Hughes' home in Memphis, Tennessee. Flowers won $1,500.00 from Hughes in a game in Hughes' home. At this point, Thornton and Hughes together are into Flowers for approximately $5,500.00. Hughes blocked Flowers car in the drive way. Flowers then lost all his money to Hughes. Flowers also signed three (3) markers to Hughes for a total of $8,000.00. [See Statement of Sheriff David Bryan] Hughes then demanded $8,000.00. When Flowers could not pay, Hughes got his briefcase and his gun. Hughes then made his first threat to Flowers to pay up or he will harm him. "Wrennie" warns Willie Joe Flowers not to tell Hughes he doesn't have any money.

Hughes made a second threat to Willie Joe Flowers. Thornton and Hughes put Willie Joe Flowers and "Wrennie" Flowers in Hughes' car, a four (4) door Eagle Vision. Willie Joe Flowers and "Wrennie" Flowers are driven to Willie Joe Flowers' mother's home in Batesville, Mississippi. The purpose of this trip was to allow Willie Joe Flowers to contact his

lawyer to get the money. By this time, it was late Monday night or early Tuesday morning.

According to Earnestine Flowers, once Willie Joe was inside his mother's home, he started to cry and begged his mother, who was leaving to go to church, not to go near the car that had the two men inside it, and to not ask any questions, but to trust him on the matter. [See Affidavit of Earnestine Flowers]

Thornton and Hughes left the Flowers momentarily but returned shortly. While Hughes and Thornton are gone, Willie Joe asks Steve Flowers, his brother, about the money and threats. Apparently, Steve Flowers knows of Danny Hughes and asks Willie Joe why he is involved with Danny Hughes. Steve Flowers then takes Willie Joe to Tim Lyles "to get a gun for protection because someone was trying to kill him". The gun originally belonged to ""Wrennie"." Lyles won it gambling. [TR 117]

Thornton and Hughes come back to the Flowers home and Hughes makes another threat to Willie Joe to "get in the car or I will harm you and your family." When the vehicle left, Thornton was driving, Hughes is in the front passenger seat, and Willie Joe is alone in the back seat on the driver's side. Thornton and Hughes take Willie Joe to a remote area in Panola County on Barnacre Road. By this time, it is around 8 or 9 o'clock p.m. Monday night. Hughes continues to demand money and threaten Willie Joe and his family throughout the ride.

According to Earnestine Flowers, Willie Joe's wife, Francine Flowers, having seen Willie Joe in the car, went to the church to inform Willie Joe's mother to "go find (Willie Joe)," stating, "they've taken him (Willie Joe) out to kill him. Don't go home." Ms. Earnestine Flowers, Willie Joe's mother, left with Francine, went to her house on Barnacre Road and called Willie Joe's home. There was no answer. While driving back toward's Batesville, Earnestine Flowers met Panola County Chief Deputy Sheriff, James Rudd, and asked him to help her look for Willie Joe. [See Affidavit of Earnestine Flowers]

The shooting took place in the car, an Eagle Vision with "baby locks." Thornton testified Willie Joe was locked in the back seat. [TR 218] According the autopsy report, Danny Hughes was shot with a medium caliber handgun (commonly called a "Saturday Night Special"). A review of the autopsy report indicates powder burns on the right back of

a plaid jacket consistent with the bullet hole, which entered the right buttock of Hughes. This wound does not appear to be immediately fatal. This bullet traveled behind the lumbar spine and passed through the left kidney, small intestines, stomach, left diaphragm, and in lower lobe of left lung. This wound, it appears, cause Hughes to bleed internally. [See Autopsy Report of Danny Hughes, Deceased] When the first shot was fired, Thornton slammed on the brakes and the car swerved into a ditch [See Report of David Bryan - noting skid marks] Thornton jumped out of the car and disappeared, which is consistent with the "Vice Lord" cap found in the bushes approximately 4 to 5 yards on the side of road. There were other shots, one to the right wrist, which is consistent with shooting at Hughes gun hand, one to the midline of the head, which is consistent with Hughes turning and facing Flowers in the back seat and the left temple (a keyhole wound), which is consistent with Flowers attempting to move away and exit the back of the vehicle, and with Hughes, though mortally wounded from the first shot, still being able to pursue his attack on Willie Joe. None of these shots had powder burns. The shot to the gun hand was not fatal; the shot to the midline of the head was not fatal because the bullet did not penetrate the skull. According to the autopsy report, this bullet traveled under the right eye socket and lodged under the skin in front of the right ear. The last shot, the keyhole wound, was not fatal but caused a skull fracture, which would likely rendered Hughes unconsciousness.

Willie Joe Flowers put Hughes in the trunk of the Hughes' car and drove back to his nearest relatives for help. Cecil Young and Larry Gene Young, his uncles, lived near his grandmother, Mary Young, in the vicinity of Barnacre Road. [See Report of Sheriff David Bryan]

Thornton meanwhile had made his way to a residence, believed to be the Wilbourn house, in the Redhill community, in Panola County. Someone at the Wilbourn home telephoned the Panola County Sheriff's Department to report a shooting. The description given of the car was a 1994 green Eagle Vision, which was registered in Tennessee to Sherry Taylor, Hughes cousin. [TR 576] [See Panola Sheriff's Department Log for time of this call, which was approximately 8:15 p.m. on Monday night] Someone then took Thornton to South Panola Community Hospital, where he was treated for minor cuts and abrasions and was released. Also, Irving Bishop was at the Wilbourn home when the call took place. [TR 127, 163] [See Report of Sheriff David Bryan).

Willie Joe Flowers apparently panicked. He believed he had killed Thornton's collector/enforcer from Memphis, and Thornton's whereabouts were unknown to Willie Joe Flowers. According to Sheriff David Bryan, one Warner Brothers watch with leather band and one diamond ring was produced by Cecil Young. According to the evidence submission forms: Exhibit 6 - Saturday Night Special, a gun; Exhibit 7 - one Warner Brothers Watch, one men's gold diamond ring; Exhibit 8 - one brown briefcase. Missing from any record is any cash; Hughes' Rolex watch; Hughes' gun he left Memphis with; Hughes' gold bracelet; and evidence of cocaine in Hughes blood stream. [TR 256] Exhibits 8 through 11 were held by crime lab.

According to the transcript, Cecil Leo Young and Larry Gene Young, accompanied by Willie Joe Flowers, took the body of Hughes and "threw it off Bobo Bridge," also located in Panola County, Mississippi [See Report of Sheriff David Bryan). The Youngs then drove the Hughes car back to Batesville and put Willie Joe out at his mothers. When Earnestine Flowers got home, Willie Joe Flower's father, Willie Flowers, Sr., informed her that Willie Joe had called, but was scared to come home. Willie Flowers, Sr. left and began to search for Willie Joe. He did not find him. Earnestine Flowers called her mother, Mary Young, and told her to tell her brothers, Cecil Leo Young and Larry Gene Young not to burn the car. Willie Flowers, Sr. went to Mary Young's home. Around 12:00 or 1:00 p.m., Willie Joe Flowers turned himself in and began to "freak out", The Mental Health in Oxford, Mississippi was contacted because Willie Joe need treatment and/or medicine. Willie Joe went to the Sheriff's Department in Panola County, Mississippi and turned himself in. The Youngs apparently kept the car because it was later recovered from them. According to trial testimony of Sheriff David Bryan, the Youngs were interviewed three (3) times, once by Deputies Mark Whitten and Darryl Johnson, then by Deputy Mark Whitten and Chief Deputy James Rudd, then by Chief Deputy James Rudd and Sheriff David Bryan. Sheriff Bryan testified they did not always tell the same story. [TR 148] However, Deputy Mark Whitten testified that the Youngs told similar stories on the 7th and 8th. [TR 182]

According to Sheriff Bryan's statement, three (3) unidentified black men had the knowledge that a shooting occurred in the vicinity off Barnacre Road. The only person who could have given them this information was Charlie Thornton. These three (3) men were Derrick Mask, James Bishop and Eric Bishop. [See District Attorney list). These

men identified the shooting scene by a cat licking blood. At 10:10 p.m., David Bryan had Meeks Wrecker Service, Batesville, Mississippi, sent to Mary Young's residence to tow the car. At 11:00 p.m., Sheriff David Bryan arrived at Bobo ditch with the Youngs. At 11:25 p.m., Chief Deputy Sheriff James Rudd took the Youngs to jail in Panola County. At 12:43 a.m., Cooley's Mortuary Funeral Home was contacted to pick up the body. [See jail log] At 12:51 a.m., Tuesday, March 8th, the body was recovered from Bobo ditch. [See Sheriff David Bryan's statement] On March 8, 1994, at 1:36 a.m., Clara Thornton called Panola County Sheriff's Department and requested that "P-4" call her at 487-3261 in reference to some threats about bombing her house she received from "Danny's People". She said P-4 would know who she was.

B. The Proceedings Below

Willie Joe Flowers was represented at the trial court level by Johnnie E. Walls, Jr. of Walls Law Firm, P.A., Post Office Box 634, 163 North Broadway, Greenville, Mississippi 38702-0634. At trial, Willie Joe Flowers testified in his own defense and raised the defense of self-defense "stating he was in fear of his life and for the lives of his family members." Numerous motions were filed the most important were a Motion To Suppress Evidence, a Motion For Severance, a Motion For Production of Exculpatory Materials, and ore tenus motions made during the trial of the matter for a mistrial and the post-trial JNOV Motion.

Post-trial motions filed by Mr. Flowers, by and through counsel Johnnie E. Walls, Jr. raised the issues that the trial Court erred as follows:

a. overruling directed verdict motion and peremptory instruction D-1;
b. denying motions for mistrial;
c. striking jurors opposed to the death penalty;
d. sufficiency of the evidence for JNOV.

However, in the appeal of this case, the only issue presented was clarification of jury instruction in the following manner:

Jury Instruction C-13A given by the trial Court reads:

> The Court instructs the Jury that to make a killing justifiable on the grounds of self-defense, the danger to the

> Defendant must be either actual, present and urgent, or the Defendant must have reasonable grounds to apprehend a design on the part of the victim to kill him or his family or to do him or his family some great bodily harm, and in addition to this the Defendant must have reasonable grounds to apprehend that there is **imminent** danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the Defendant acts.

"After deliberating for three hours, the jury sent a note to the trial judge which stated, '(P)lease explain C-13A, imminent versus immediate, definition, and the rest of the paper.' After discussing the note with counsel, the court sent a note to the jury stating, '(M)embers of the jury, I cannot explain this instruction further.' The jury sent another note requesting a dictionary and a thesaurus. The Court then gave a supplemental jury instruction, over Flowers' objection which stated:

C-15

> Based on your second request, I will attempt to assist you. According to *Webster's New World Dictionary, Third College Edition*, the word 'imminent' is defined as 'likely to happen without delay, impending, threatening'. I do not feel that the word 'immediate' should be defined, but instead you may apply to that word your perceived common usage. [Emphasis Ours]
>
> I must caution you that this additional instruction must be read with all the other instructions, since I have previously instructed you that you should not single out one instruction alone as stating the law, but instead the instructions must be read together and considered as a whole. Also, I remind you that you must apply all the law to the facts in this case as you find the facts to be from the evidence before you." [Emphasis Ours]

Flowers argued in his appeal that the trial Court erred in giving a supplemental instruction because the jury likely "gave it more weight than the other instructions."

In his petition for hearing, Flowers, by and through the undersigned subsequent counsel of record, requested the Court to review the Jury Instructions in toto under an incorrect statement of the law analysis. Flowers cited *Flowers v. State*, 473 So.2d 164 (Miss 1985) and Section 97-3-15 MCA.

Flowers also cited *Gooch v. State*, (1946) 199 Miss 280, 24 So.2d 736 and *Black's Law Dictionary, 3rd Edition* definition as to imminent. Flowers distinguished the definition of imminent as given by the trial court relying upon *Webster's New World Dictionary, Third College Edition.* Flowers further cited to *Tran v. State*, Supreme Court No. 92-KA-01058-SCT, decision dated August 22, 1996.

Because Flowers did not address as error the "incorrect statement of the law" created by trial judge's inclusion of a *Webster's* definition and the failure to exclude the word "immediate" by the trial judge, this Court did not consider it as error on appeal.

Blacks Law Dictionary defines "imminent danger" as follows:

> **Imminent danger.** In relation to homicide in self-defense, this term means immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law. Or, as otherwise defined, such as appearance of threatened and impending injury as would put a reasonable and prudent man to his instant defense. *See* Self-Defense. [Emphasis Ours]

The combined instructions given by the trial judge was an incorrect statement of the law in the context of a capital murder/kidnapping trial when the defense was self-defense.

The Court also gave Instruction D-20, which reads:

> The Court instructs the jury that you are not to judge the actions of Willie Joe Flowers in the cool, calm light of after-developed facts, but instead you are to judge the defendant's actions in the light of the circumstances confronting the defendant at the time, as you believe from

the evidence that those circumstances reasonably appeared to the defendant on that occasion; and if you believe that under those circumstances it reasonably appeared to Willie Joe Flowers that the deceased took up a weapon, that the defendant then and there had reasonable ground to apprehend a design on the part of Danny Hughes to kill the defendant or to do the defendant some great personal injury, and that there reasonably appeared to the defendant to be imminent danger of such designs being accomplished, then the defendant was justified in anticipating an attack by Danny Hughes and further if you believe from the evidence that Danny Hughes died as the result of the discharge of a pistol which was, at the time of the fatal shot, in the possession of Willie Joe Flowers but that the fatal shot was fired at a time when Willie Joe Flowers was lawfully acting in his defense, then you must find Willie Joe Flowers "Not Guilty."

The Court of Appeal relied on *Wright v. State*, 512 So.2d 679 (Miss 1987), which held a supplemental instruction was not error because in *Wright* the Court concluded the supplemental instruction was a correct statement of the law. [Emphasis Ours] Appellant asserts that even the jury instructions are considered as a whole, the giving of the supplemental instruction was error in that it was an incorrect statement of the law, thus *Wright* is distinguishable.

The Court denied Instruction D-24, which reads:

The Court instructs the jury that the defendant, Willie Joe Flowers, was entitled to act upon appearances, and if the conduct of the deceased was such as to induce in the mind of a reasonable person, situated as he was, under all the circumstances then existing, and viewed from the standpoint of the defendant, a fear that death or great bodily harm was about to be inflicted by the deceased on him, it does not matter if there was no such danger provided that the jury believed that the defendant acted in self-defense from real and honest conviction, then the jury should find him "Not Guilty", even though they believe that at the time he was mistaken and that he was not in any great danger.

Appellant asserts this instruction should have been given.

Appellant further asserts that had said instruction been given to afford the jury an opportunity to more fully consider Flowers defense particularly in light of the conflicting testimony at trial of two witness accomplishes when contrasted with the testimony of Deputy Sheriff Mark Whitten and Flowers.

None of the instructions given used the word "immediate," yet the jury specifically requested the Court to define "immediate." [See note from Jury included in trial exhibits]

The Court did not define "immediate" it simply instructed the jury "...I do not feel that the word "immediate" should be defined, but instead you may apply to that word your perceived common usage..." (Supplemental Instruction, *supra.*)

Appellant asserts the use of the word "immediate", which is the definition given of "imminent" is not a correct statement of law.

The jury also asked the Court to explain "...the rest of the paper (over) referring to Instruction C-13A..." The Court did not address this portion of the jury's request.

Appellant asserts it is clear the jury was confused and did not comprehend Instruction C-13A or the instructions as a whole.

There is a long and troubling history in the giving of self-defense instructions. This is evidenced by this Court's criticism of self-defense instructions in a long line of cases as discussed and set out in *Flowers v. State*, 473 So.2d 164 (Miss 1985). The conflict and criticism rose to such a level that in *Flowers, supra.* the Court over-ruled numerous cases in its attempt to guide trial courts in the giving of self-defense instructions properly stating the law and according a defendant his legal right to a proper self-defense instruction.
Flowers, 473 So.2d at 166.

The jury is instructed unambiguously in the Court's instruction on guilt. [See Jury Instruction S-2, S-5, C-10, C-1A attached as Aggregate Exhibit D] The jury should not have to construe the Defendant's theory of self-defense from piece-meal instructions when self-defense can easily be

set forth in a single instruction also.

As the *Flowers* Court said in dicta, "... it is especially important in a factually close case that the jury be properly instructed..." *Flowers, Id.* at 166.

Appellant asserts the concept of self-defense should be clearly defined and succinctly set forth in the Courts instruction. Section 97-3-15 MCA states in pertinent part:

> **Section 97-3-15.** Homicide; justifiable homicide.
>
> (1) The killing of a human being by the act, procurement, or omission of another shall be justifiable in the following cases:
>
> > (e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon him, or ...
> >
> > (f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished; ...

"Omission from state's instruction defining justifiable self-defense that danger of death or great bodily harm may be either real or reasonably apparent, constituted reversible error where under state's proof defendant was guilty of murder whereas under her proof jury could have found that defendant acted in justifiable self-defense, since in such a situation it is important that the state's instruction be technically correct. [Emphasis Ours] *Gooch v. State*, (1946) 199 Miss 280, 24 So.2d 736.

By using the *Webster's* definition of imminent and failing to use the *Black's* definition as the legal definition relating to homicide in self-defense actually reads, the Court negated or took away the jury's right to consider

"the appearance of as it would be perceived by a reasonable prudent person.

Appellant asserts that the instruction to the jury regarding Flowers' defense of self-defense contained in Instruction D-20 and C-13A, as amended by Instruction C-15 is not a correct statement of the law either individually or when said instructions are read together.

Instructions D-20, C-13A, and C-15 are in conflict with C-1A in which the Court instructs the jury:

> In Count 1, the Defendant, WILLIE JOE FLOWERS, has been charged with the crime of Capital Murder.
>
> If you find from the evidence in this case, beyond a reasonable doubt, that:
>
> 1) The deceased, Danny Hughes, was a living person; and,
>
> 2) On or about March 7, 1994, Willie Joe Flowers did wilfully and of his malice aforethought;
>
> 3) Kill and murder Danny Hughes while Willie Joe Flowers was engaged in the commission of the crime of Robbery; and,
>
> 4) The killing of Danny Hughes was not in necessary self-defense; then you shall find the Defendant, Willie Joe Flowers, guilty of Capital Murder.
>
> If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you must find the Defendant not guilty of Capital Murder.
>
> If you find that the State has failed to prove, beyond a reasonable doubt, any one or more of the elements of the crime of Capital Murder, you will find the Defendant not guilty of this original charge and proceed with you deliberations to decide whether the State has proven, beyond a reasonable doubt, all of the elements of

the lesser crime of Murder. After deliberations, if you find from the evidence, beyond a reasonable doubt, that:

1) The deceased, Danny Hughes, was a living person; and,

2) On or about March 7, 1994, Willie Joe Flowers did wilfully and of his malice aforethought;

3) Kill and murder Danny Hughes;

4) With the deliberate design to effect the death of Danny Hughes, and,

5) The killing of Danny Hughes was not in necessary self-defense; then you shall find the Defendant, Willie Joe Flowers, guilty of Murder.

If the State has failed to prove, beyond a reasonable doubt, any one or more of the elements of the lesser offense of Murder, then you must find the Defendant not guilty of Murder and proceed with your deliberations to decide whether the State has proven, beyond a reasonable doubt, all the elements of the lesser crime of Manslaughter. After deliberations on this lesser offense, if you find from the evidence, beyond a reasonable doubt, that:

1) Danny Hughes was a living person; and,

2) On or about March 7, 1994, the Defendant, Willie Joe Flowers did kill Danny Hughes;

3) Without malice;

4) In the heat of passion;

5) By the use of a dangerous weapon;

6) Without authority of law; and,

7) Not in necessary self-defense,
then you shall find the Defendant, Willie Joe Flowers, guilty of Manslaughter.

If the State failed to prove, beyond a reasonable doubt, any one of more of the elements of the crime of Manslaughter, then you shall find the Defendant not guilty.

You should consider the lesser offense instruction only if you first find that the Defendant is not guilty of the original charge of Capital Murder. However, notwithstanding this right to find the Defendant guilty of a lesser crime than that originally charged, it is your duty to accept the law as given to you by the court, and if the facts and the law warrant a conviction of the original charge, then it is your duty to make such finding uninfluenced by your power to find a lesser offense. This provision is not designed to relieve you from the performance of an unpleasant duty; however, it is included to prevent a failure of justice if the evidence fails to prove the original charge but does justify a verdict for a lesser crime.

The case of *Tran v. State*, Supreme Court No. 92-KA-01058-SCT, decision dated August 22, 1996, is analogous to the instant case.

Tran argued the improper instructions given were in hopeless conflict with the proper instructions, a situation which compelled the jury to resolve the conflict and to select the proper law applicable to the facts of his case. The Court held in Tran's favor.

In the instant case, the conflict in the jury instructions and the ambiguities created should be resolved in favor of Flowers.

Flowers should have raised these other issues on appeal because they were properly raised at trial and in post-trial motions:

1) The court erred in denying defendant's several motions for mistrial during the trial and during the closing argument of the state.

2) The court erred in striking people who did not believe in the death penalty for cause.

3) The verdict of the jury was contrary to overwhelming weight of the credible evidence presented and said evidence presented did not support the conviction.

Flowers will be prejudiced without an opportunity to put before the Court all issues that should be considered on appeal.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE TRIAL COURTS ERROR IN IMPROPERLY INSTRUCTING THE TRIAL JURY VIOLATES DEFENDANTS SIXTH AMENDMENT RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Flowers argues that he should be allowed to have these issues reviewed since they were properly preserved at trial and in post-trial motions. [See also *Wilson v. State*, No. 91-KA-00294-SCT]

In *Craig v. State*, No. 92-KA-00277-SCT, this Court reviews the applicability of *Long v. State*, 52 Miss 23, 34 (1876), *Haynes v. State*, 451 So.2d 227, 229 (Miss. 1984), and *Cook v. State*, 467 So.2d 203 (Miss. 1985) in the context of a "stand your ground self-defense instruction."

In the instant case, Instruction D-19 should have been given. Flowers had been prevented from leaving Memphis by the blocking of his car, by being followed from Memphis by both Thornton and Hughes, he was driven from Memphis to his mother's home by ""Wrennie"" and at the time of the shooting, he was alone in the back seat of a car under the control of Thornton and Hughes.

In another *Flowers* case, (not same Defendant), this court granted a new trial because of the self-defense instruction given by the trial Court. In this *Flowers* case, this Court said:

> "...The test is whether or not a reasonable person had reasonable grounds to fear, and did fear for his life or great bodily harm.

Flowers v. State, 473 So.2d 164, 167

In the instant *Flowers* case, the issue of conflicting self-defense instructions is set out in Flowers Motion for Rehearing and in his brief on appeal.

This Court should grant cert to resolve the conflict in the Court's instruction.

There is a general right to defend oneself against the use of unlawful force. In some circumstances, the defense may be by means of deadly force; at other times, it is limited to non-deadly force. When successfully asserted, the defense is a complete one, and can result in an acquittal not only on homicide charges, but on other charges, such as aggravated assault, attempted murder, assault and battery, etc.

The following requirements must generally be met for use of the defense;

a. Resist unlawful force: The defendant must have been resisting the present or imminent use of unlawful force;

b. Force must not be excessive: The degree of force used by the defendant must not be more than is reasonably necessary to defend against the threatened harm;

c. Deadly force: The force is used by the defendant may not be deadly, i.e. likely to cause death or serious bodily injury, unless the danger being resisted was also deadly force;

d. Aggressor: The defendant must not have been the aggressor unless (1) he was a non-deadly aggressor

confronted with the unexpected use of deadly force, or (2) he withdrew after his initial aggression, and the other party continued to attack;

e. Retreat: The defendant must not have been in a position from which he could retreat with complete safety, unless (1) the attack takes place in the defendant's dwelling, or by the modern view, his place of work or (2) the defendant uses only non-deadly force.

Self-defense applies only where the defendant is resisting force that is unlawful. In general, this means that the other party must be committing a crime or tort. If the other party, even though he is using force, is entitled to do so, the force is not unlawful and the defendant may not use force to defend against it.

The Model Penal Code allows deadly force to be used to protect against not only death and serious bodily harm, but "kidnapping or sexual intercourse compelled by force or threat ..." The privilege of self-defense thus blends into the privilege to prevent violent felonies by use of deadly force.

The harm being defended against must be reasonably imminent. The danger that one may be attached tomorrow will not suffice; this rule derives principally from the desire of courts to encourage non-violent dispute-resolution, particularly where there is time to take other measures.

"Detacted reflection" is not required. The reason for this rule is that in a typical situation the defendant is confronted with the need for immediate action, and should not be penalized for an innocent mistake. As Justice Holmes said, "Detacted reflection cannot be demanded in the presence of an unlifted knife." *Brown v. U.S.*, 256 U.S. 335 (1921).

But if the defendant's mistake is unreasonable, most states hold that he loses the right to claim self-defense. "It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief..." *Shorter v. People*, 2 N.Y. 193 (1849) In determining whether the defendant's mistake was "reasonable", however, a few courts have taken into account his educational and intellectual shortcomings, or his unusual timidity.

A person may use force to defend another in roughly the same circumstances in which he would be justified in using force in his own defense. The defendant must generally meet the following requirements, in order to assert a claim of defense of others:

a. Danger to other: He reasonably believes that the other person is in imminent danger of unlawful bodily harm;

b. Degree of force: The degree of force used by the defendant is no greater than that which seems reasonably necessary to prevent the harm; and

c. Belief in another person's right to use force: The defendant reasonably believes that the party being assisted would have the right to use in his own defense the force that the defendant proposes to use in his assistance.

The traditional view of the mistake as to who is the aggressor, sometimes called the "alter ego" rule, is that the defendant "stands in the shoes" of the person he aids. Under this view, if the person aided would not have had the right to use that degree of force in his own defense, the defendant's claim fails.

The more modern view to aforementioned mistake is that so long as the defendant's belief that unlawful force is being used against the person to be aided is reasonable, the defendant may assert a claim of defense of others even if his evaluation turns out in retrospect to have been wrong. This is the rule imposed by Model Penal Code Section 3.05(1)(b), which refers to "the circumstances as the actor believes them to be..."

Traditional view of deadly force has been that such devices may at least be used in situations where the owner, if he were present, would be entitled to use deadly force himself. Suppose, for instance, that a homeowner sets up a spring gun, i.e. a gun whose trigger is attached to a door or window, so that it fires when entry is made. If the gun shoots an armed burglar, the owner will probably escape liability, since he would in most jurisdictions have had the right to use deadly force against the burglar personally.

But the modern view of deadly force prohibits the use of such devices altogether, even if they happen to go off in a situation where the

owner himself would have been justified in using deadly force.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the trial court instructed the jury in a deliberate homicide trial that "the law presumes that a person intends the ordinary consequences of his voluntary acts..." The Montana Court held that the instruction did not violate due process standards. This Court held:

> Because the jury may have interpreted the challenged presumption as conclusive, like the presumptions in *Morissette v. United States*, 342 U.S. 246, and *United States v. United States Gypsum Co.*, 421 U.S. 684, and because either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction is unconstitutional.

Id. at _____.

The Court reasoned:

> (a) The effect of a presumption in a jury instruction is determined by the way in which a reasonable juror could have interpreted it, not by a state court's interpretation of its legal import.
>
> (b) Conclusive presumptions "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," *Morissette, supra*, at 275, and they "invad[e the] fact finding function," *United States Gypsum Co., supra*, at 446, which in a criminal case the law assigns to the jury. The presumption announced to petitioner's jury may well have had exactly these consequences, since upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and "ordinary consequences" of petitioner's action), the jury could have reasonably concluded that it was directed to find against petitioner on the element of intent. The State was thus not forced to prove "beyond a

reasonable doubt...every fact necessary to constitute the crime...charged," *In re Winship*, 397 U.S. 358, 364, and petitioner was deprived of his constitutional rights.

(c) A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to petitioner, would have suffered from similar infirmities. If the jury interpreted the presumption in this manner, it could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was then shifted to petitioner to prove that he lacked the requisite mental state. Such a presumption was found constitutionally deficient in *Mullaney, supra.*

(d) Without merit is the State's argument that since the jury could have interpreted the word "intends" in the instruction as referring only to petitioner's "purpose," it might not have relied upon the tainted presumption at all. First, it is not clear that a jury would have so interpreted "intends." More significantly, even if a jury could have ignored the presumption, it cannot be certain that this is what it did do, as its verdict was a general one.

(e) Since whether the jury's reliance upon the instruction constituted, or could have ever constituted, harmless error are issues that were not considered by the Montana Supreme Court, this Court will not reach them as an initial matter.

Id. at 514-527

Also in *Yates v. Evatt*, 500 U.S. 391 (1991), the defendant was charged with accomplice murder while committing a robbery. In the instruction on the element of malice, the trial court instructed the jury inter alia, "malice is implied or presumed from either the willful, deliberate, and intentional doing of an unlawful act or from the use of a deadly weapon. The defendant was convicted and the State Supreme Court upheld his conviction. This Court reversed holding:

1. The State Supreme Court failed to apply the proper harmless-error standard, as stated in *Chapman v. California*, 386 U.S. 18, 24, which held that an error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

(a) An error does "not contribute to a verdict" only if it is unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. In applying *Chapman*, a court must first ask what evidence the jury actually considered in reach its verdict, and it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. It is not enough that the jury considered evidence from which is could have reached the verdict without reliance on the presumption. The issue is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Before looking to the entire trial record to assess the significance of the erroneous presumption, however, it is crucial to ascertain from the jury instructions that the jurors, as reasonable persons, would have considered that entire trial record.

(b) The State Supreme Court employed a deficient standard of review. Its stated enquiry can determine that the verdict could have been the same without the presumptions, when there was evidence sufficient to support the verdict independently of the presumptions' effect. However, it does not satisfy Chapman's concerns, because is fails to determine whether the jury's verdict did rest on that evidence as well as on the presumptions, or whether that evidence was of such compelling force as to show beyond a reasonable doubt that the presumptions must have made no difference in reaching the verdict.

2. The jury instructions may not be excused as harmless error.

> (a) Judicial economy is best served if this Court makes its own assessment of the errors' harmlessness in the first instance, because this case has already been remanded twice, once for such an analysis. See *Rose v. Clark*, 478 U.S. 570, 584.
>
> (b) The trial judge instructed the jury that malice is the equivalent of an intent to kill. While is can be inferred from the instructions and the record that the jury considered all of the evidence regarding Davis' intent to kill, it cannot be inferred beyond a reasonable doubt that the unlawful presumptions did not contribute to the finding on the necessary element of malice that Davis intended to kill Mrs. Wood, since the evidentiary record is simply not clear on that issue. While an examination of the entire record reveals clear evidence of Davis' intent to kill Willie Wood, the jury was not instructed on a transferred intent theory and, thus, this Court is barred from treating such evidence as underlying the necessary finding of intent to kill Mrs. Wood. The specific circumstances of Mrs. Wood's death do not indicate Davis' malice in killing her so convincingly that it can be said beyond a reasonable doubt that the jurors rested a finding of his malice on that evidence exclusive of the presumptions. The record does not support the state court's description of Davis as having "lunged" at her and stabbed her multiple times. The record reveals only that she joined in a struggle and died from a single stab wound, which David could have inflicted inadvertently.

Id. at 400-411.

The second predicate generally determines the outcome of the case. If the question is the reasonableness of the defendant's perception of danger, counsel should request a detailed instruction on reasonableness. *Williams*

v. U.S., 403 F.2d 176, 179 n.2 (D.C. Cir. 1968); *U.S. v. Jackson*, 569 F.2d 1003, 1007 n.7 (7th Cir.), *cert. denied*, 437 U.S. 907 (1978)

Defense counsel should request an instruction that the defendant's belief may seem unreasonable in hindsight, but may have been reasonable in the "heat of passion." *See Brown v. U.S.*, 256 U.S. 335, 343 (1921); *Inge v. U.S.*, 356 F.2d 345, 348 (D.C. Cir. 1966).

II. CUMULATIVE ERRORS BEGINNING AT THE TRIAL COURT LEVEL AND THE FAILURE TO GRANT APPELLATE RELIEF IS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION SET OUT IN THE FIFTH AMENDMENT MADE APPLICABLE TO THE STATES BY AND THROUGH THE FOURTEENTH AMENDMENT.

A. The Trial Court Erred in Failing to Grant Pre-trial Motion for Production of Exculpatory Materials

B. The Trial Court Erred in Failing to Grant Motion for New Trial

C. The Trial Court Erred in Failing to Grant Directed Verdict

E. The Trial Court Erred in Failing to Grant JNOV

F. Error Was Committed by Failing to Have a Mental Examination to Determine Competency to Stand Trial or in the Alternative to Mitigate Sentence

G. The Mississippi Supreme Court Erred in Failing to Grant Petition for Certiorari

Flowers has never presented for review on appeal the errors he maintains were committed at the trial court level.

In *Dickey v. State*, Dickey was granted an out-of-time appeal when his lawyer failed to perfect his appeal because he reached indigent status and the trial court failed to advise him that even though he had retained trial counsel, he could appeal "in forma pauperis." (Citations Omitted). *Dickey v. State*, No. 92-KP-00143-SCT.

In the instant case, Flowers, through counsel Johnnie Walls, filed an appeal. Because of the sole issue raised on appeal, Flowers has not been able to present errors outlined herein. and in post-trial motions. Flowers should be granted cert and allowed to properly appeal.

In *McLemore v. State*, this Court granted cert based on the fact the prosecution argued in closing "other crimes" as substantive evidence of guilt and that Defendant was not allowed to testify to the bias and prejudice of the officers of the Sheriff's Department. *McLemore v. State*, No. 92-CT-00463-SCT.

Flowers also properly preserved his challenge to the sufficiency of the evidence in his JNOV post-trial motion. In *Sharp v. State*, 120 So.2d 207 (Fla 1960), the Court found that the State failed to meet its burden of proof even though the *Sharp* jury found Sharp guilty of manslaughter. The *Sharp* Court said, "the state had the burden of proving to the exclusion of every reasonable doubt that the appellant was culpably negligent."

In the instant case, this Court should grant cert to review the sufficiency of the evidence issues raised by Flowers.

Flowers also properly preserved the issue of a new trial in his post-trial motions.

In *Schlup v. Delo*, _____ U.S. _____ (1995), the defendant was charged of participating in the murder of a fellow inmate. The defendant was convicted and the District Court upheld his conviction. This Court reversed holding:

> The standard of *Murray v. Carrier*, 477 U.S. 478 - which requires a habeas petitioner to show that "a constitutional violation has probably resulted in the conviction of the one who is actually innocent," *id.*, at 496 - rather than the more stringent Sawyer standard, governs the miscarriage of

justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims.

(a) In contrast to the actual innocence claim asserted in *Herrera v. Collins*, 506 U.S. _____ - that the execution of an innocent person convicted in an error-free trial violates the Eighth Amendment - Schlup's claim is accompanied by an assertion of constitutional error at trial: the ineffectiveness of his counsel and the withholding of evidence by the prosecution. As such, his conviction may not be entitled to the same degree of respect as one that is the product of an error-free trial, and his evidence of innocence need carry less of a burden. In Herrera, the evidence of innocence would have had to Page II be strong enough to make the execution "constitutionally intolerable" even if the conviction was the product of a fair trial, while here the evidence must establish sufficient doubt about Schlup's guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial.

(b) The societal interests in finality, comity, and conservation of scarce judicial resources dictate that a habeas court may not ordinarily reach the merits of successive or abusive claims, absent a showing of cause and prejudice. However, since habeas corpus is, at its core, an equitable remedy, a court must adjudicate even successive claims when required to do so by the ends of justice. Thus, in a trio of cases, this Court firmly established an

exception for fundamental miscarriages of justice. *Carrier*, 477 U.S., at 495; *Kuhlmann v. Wilson*, 477 U.S. 436; *Smith v. Murray*, 477 U.S. 527. To ensure that the fundamental miscarriage of justice exception would remain "rare" and be applied only in the "extraordinary case," while at the same time ensuring that relief would be extended to those who are truly deserving, the Court has explicitly tied the exception to the petitioner's innocence. *Carrier* and *Kuhlmann* also expressed the standard of proof that should govern consideration of such claims: The petitioner must show that the constitutional error "probably" resulted in the conviction of one who was actually innocent. The Sawyer Court made no attempt to reconcile its more exacting standard of proof with Carrier's use of "probably."

(c) Carrier, rather than Sawyer, properly strikes the balance between the societal interests and the individual interest in justice, when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent. Though challenges to the propriety of imposing a death sentence are routinely asserted in capital cases, a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare and must be supported by new reliable evidence that was not presented at trial, evidence obviously unavailable in the vast majority of cases. Thus, the threat to judicial resources, finality, and comity posed by actual innocence claims is significantly less than that posed by sentencing claims. More importantly, the individual interest in

avoiding injustice is most compelling in the context of actual innocence, since the quintessential miscarriage of justice is the execution of an innocent person. The less exacting Carrier standard of proof reflects the relative importance attached to the ultimate decision. Application of the stricter Sawyer standard would give insufficient weight to the correspondingly greater injustice that Page III is implicated by an actual innocence claim. Pp. 24-28.

(d) To satisfy Carrier's "actual innocence" standard, a petitioner must show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. The focus on actual innocence means that a district court is not bound by the admissibility rules that would govern at trial, but may consider the probative force of relevant evidence that was either wrongly excluded or unavailable at trial. The district court must make a probabilistic determination about what reasonable, properly instructed jurors would do, and it is presumed that a reasonable juror would consider fairly all of the evidence presented and would conscientiously obey the trial court's instructions requiring proof beyond a reasonable doubt. The Carrier standard, although requiring a substantial showing, is by no means equivalent to the standard governing review of insufficient evidence claims. *Jackson v. Virginia*, 443 U.S. 307, distinguished. In applying the Carrier standard to Schlup's request for an evidentiary hearing, the District Court must assess the probative force of the newly presented evidence in connection

> with the evidence of guilt adduced at trial. The court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment, but may consider how the submission's timing and the affiants' likely credibility bear on the probable reliability of that evidence. Pp. 28-34.

11 F.3d 738, vacated and remanded.

CONCLUSION

For the foregoing reasons and authorities, this Court should issue a *Writ of Certiorari.*

Respectfully submitted,

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Willie Joe Flowers

October 8, 1997

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VS. **CAUSE NO. CR 94-14-C(P2)**

WILLIE JOE FLOWERS
Race B Sex M
DOB: 10/05/71
SSN: 324-64-7683

SENTENCE OF THE COURT

This day into open Court came the District Attorney who Prosecutes for the State of Mississippi and came the Defendant, WILLIE JOE FLOWERS, in his own proper person and represented by counsel, Johnny Walls; said Defendant having been found guilty by a Jury on August 5, 1994, of the crime of Manslaughter.

And the Court, after hearing all testimony offered by the Defendant and the State and argument of counsel, and being fully advised in the premises, pronounced sentence against the Defendant, WILLIE JOE FLOWERS.

IT IS HEREBY ORDERED that WILLIE JOE FLOWERS, be and is hereby sentenced as follows: To serve a term of twenty (20) years in the Mississippi Department of Corrections.

Further, Defendant shall pay $200.00 to Mississippi Crime Victims' Compensation Fund, and pay all costs of Court, with all

assessments due within six (6) months from the Defendant's release from Mississippi Department of Corrections.

Appeal Bond is hereby set in the amount of $50,000.00 in accordance with the Mississippi Uniform Criminal Rules of circuit Court Practice and only in the event that an appeal is perfected to the Mississippi Supreme Court.

The Defendant is hereby remanded into the custody of the Sheriff of Panola County, Mississippi, to await transportation to the Mississippi Department of Corrections.

Defendant is given 184 days credit for time served while awaiting trial as required by law.

SO ORDERED this the 7th day of September, 1994.

/s/ GEORGE C. CARLSON, JR.
CIRCUIT COURT JUDGE

APPENDIX B

IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 94-KA-00927 COA

WILLIE JOE FLOWERS — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DECIDED: FEBRUARY 25, 1997

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE:	HON. GEORGE C. CARLSON, JR.
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOHNNIE E. WALLS, JR.
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIDRE MCCRORY ROBERT L. WILLIAMS
DISTRICT ATTORNEY:	CRIMINAL
NATURE OF THE CASE:	DEFENDANT CONVICTED OF MANSLAUGHTER AND SENTENCED TO 20 YEARS
TRIAL COURT DISPOSITION:	

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.
SOUTHWICK, J., FOR THE COURT:

Defendant, Willie Joe Flowers was convicted of manslaughter in the Panola County Circuit Court. On appeal he argues that the Court

erred in giving the jury a supplemental instruction three hours into deliberation that defined the word "imminent." We disagree and affirm.

FACTS

On the evening of March 7, 1994, Willie Joe Flowers, Charlie Thornton, and Danny Hughes were gambling by shooting dice in Batesville, Mississippi. At some point, the game moved to Hughes's house in Memphis. After Flowers won a substantial amount of money from Hughes, Hughes went outside and backed his car in a position so that Flowers's vehicle could not depart, then came back in and continued gambling. Whether Hughes' intent was to prevent Flowers' departure was in dispute.

Fearing that he was in danger, Flowers became nervous and lost all the money that he had earlier won. Flowers then borrowed several thousand dollars from Hughes, which he immediately lost. After several loans, Hughes demanded payment from Flowers and accompanied the demand with threat: if Flowers didn't have the money, then Hughes would harm him or his family.

Flowers, accompanied by Thornton and Hughes, traveled back to Batesville to the home of Flowers's mother. While Flowers went inside to ask his brother for a loan, Thornton and Hughes went to Kentucky Fried Chicken. Flowers' brother did not have the money, but suggested that they go to another friend's house and secure a gun for protection. They did so.

When Thornton and Hughes returned, Hughes demanded his money. Flowers told him that he did not have it. Hughes forced him to get into the back seat of the car, threatening to hurt him it he refused. Flowers got into the back seat, and Hughes continued to threaten him. Fearing for his life, Flowers shot Hughes. After Hughes was shot, both Flowers and Thornton jumped from the moving car, which wrecked. Flowers retrieved Hughes's dead body, put it in the trunk of the car, and deposited it in a water-filled ditch. Flowers then returned to his mother's house, revealed to her what he had done, and decided to turn himself in to the local authorities.

Flowers was indicted and tried for capital murder and kidnapping.

At the conclusion of the evidence, after deliberating for three hours, the jury sent a note to the trial judge which stated, "(P)lease explain C13-A. Imminent versus immediate, definition, and the rest of the paper." After discussing the note with Counsel, the Court sent a dote to the jury stating, "(M)embers of the jury, I cannot explain this instruction further." Almost immediately, the jury sent another note requesting a dictionary and a thesaurus.

In response, the court gave a supplemental jury instruction, over defendant's objection, which stated:

C-15

> Based on your second request, I will attempt to assist you. According to Webster's New World Dictionary, Third College Edition, the word "imminent" is defined as "likely to happen without delay; threatening." I do not feel that the word "immediate" should be defined, but instead you may apply to that word your perceived common usage.
>
> I must caution you that this additional instruction must be read with all the other instructions, since I have previously instructed you that you should not single out one instruction alone as stating the law, but instead the instructions must be read together and considered as a whole. Also, I remind you that you must apply all the law to the facts in this case as you find the facts to be from the evidence before you.

The jury convicted Flowers of manslaughter and found him not guilty of kidnapping.

DISCUSSION

On appeal, this Court does not review jury instructions in isolation; rather, they are read as a whole to determine if the jury was properly instructed. If the jury was adequately instructed, even if not perfectly instructed, this Court will not reverse. *Lovett v. Bradford*, 676 So. 2d 893, 896 (Miss. 1996). Flowers argues that the court erred in

giving this supplemental instruction because the jury likely gave it more weight than the other instructions.

In *Wright v. State*, 512 So. 2d 679 (Miss. 1987), the court gave a supplemental jury instruction, over the defendant's objection, after the jury requested further explanation of "breaking and entering." The Mississippi Supreme Court stated that "we are particularly sensitive to the danger that a supplemental instruction might cause a jury to single out and focus upon the point there presented and give it undue importance?" *Wright*, 512 So. 2d at 681. Nevertheless, the court held the instruction was properly given, being a correct statement of the law and stating that the jury was to consider all of the instructions together. *Id.*

The Mississippi Supreme Court also addressed this issue in *Shaw v. State*, 540 So. 2d 26 (Miss. 1989), where a supplemental instruction was given on the distinction between murder and manslaughter. In *Shaw*, the court stated the decision as to whether a particular point has been singled out through supplemental instructions often turns on the manner in which the instruction was presented to the jury. *Shaw*, 540 So. 2d at 30. The court affirmed, holding it was proper to caution the jury not to single out the instruction, but to consider the new instructions along with the original instructions. *Id.*

Flowers argues that the instruction confused the jury on the issue of self defense and, by defining the word "imminent" from Webster's Dictionary, was not necessarily shown to comply with Mississippi law. In fact, the Mississippi Supreme Court has defined "imminent." *Holmes v. State*, 24 So. 2d 90 (Miss. 1945), overruled on other grounds by *Flowers v. State*, 473 So. 2d 164 (Miss. 1985). In *Holmes*, the court defined the word to mean "... threatening to occur immediately; near at hand; impending." *Holmes*, 24 So. 2d at 92, citing Webster's New International Dictionary, Unabridged (2d Edition).

The supplemental instruction given in this case correctly defined the word "imminent," and it was not confusing to the jury. The court warned the jury to consider the instruction with the others, and the trial court did not err in giving it.

Finally, Flowers also argues that it was error to send the instruction to the jury in writing rather than to read it aloud in open court. Flowers failed to raise this issue at trim and, therefore, waived his right to raise it on appeal. *McNeal is. State*, 617 So. 2d 999, 1005 (Miss. 1993); *Roundtree v. State*, 568 So. 2d 1173, 1177 (Miss. 1990).

THE JUDGMENT OF THE PANOLA COUNTY CIRCUIT COURT OF CONVICTION OF MANSLAUGHTER AND SENTENCE OF 20 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF $200 TO MISSISSIPPI CRIME VICTIMS' FUND IS AFFIRMED. ALL COSTS ARE ASSESSED TO APPELLANT.

BRIDGES, C.J., MCMILLIN AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, AND PAYNE, JJ., CONCUR.

HERRING, J., NOT PARTICIPATING.

APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

NO. 94-KA-00927 COA

WILLIE JOE FLOWERS — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

ORDER

This matter is before the Court on the Appellant's motion for rehearing. After careful and thorough consideration, the Court finds that the motion should be denied.

THEREFORE, IT IS ORDERED that the Appellant's motion for rehearing be, and hereby is, denied.

SO ORDERED, this the 17th of April 1997.

/s/ JAMES E. THOMAS, PRESIDING JUDGE
FOR THE COURT

HERRING AND HINKENBEIN, JJ., NOT PARTICIPATING

APPENDIX D

IN THE SUPREME COURT OF MISSISSIPPI

NO. 94-CT-00927-SCT

WILLIE JOE FLOWERS

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

ORDER

This matter came before the Court on the Petition for Writ of Certiorari filed by Willie Joe Flowers. Upon careful consideration, the Court finds that the petition should be denied.

IT IS THEREFORE ORDERED that the Petition for Writ of Certiorari be, and hereby is, denied.

SO ORDERED, this, the 16th day of July, 1997.

/s/ DAN LEE, CHIEF JUSTICE
FOR THE COURT

TO DENY: ALL JUSTICES

APPENDIX E

CONSTITUTIONAL PROVISIONS

[AMENDMENT VI]

[Impartial Jury]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence (sic).

[AMENDMENT XIV]

Section 1.

[Due Process]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

28 USC Section 2102. Priority of criminal case on appeal from State court

Criminal cases on review from State courts shall have priority, on the docket of the Supreme Court, over all cases except cases to which the United States is a party and such other cases as the court may decide to be of public importance.

28 USC Section 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

28 USC Section 2104. Appeals from State courts

An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States.

28 USC Section 2105. Scope of review; abatement

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

28 USC Section 2106. Determination

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.